OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

July 18, 2002

Ms. Patricia E. Carls
Brown & Carls, L.L.P.
106 East Sixth Street, Suite 550
Austin, Texas 78701

OR2002-3951

Dear Ms. Carls:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165132.

The City of Georgetown (the "city"), which you represent, received a request for "info[rmation] about who complained about pool problems" at a specified address. As responsive to this request, you have submitted the entire report regarding the problems. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." This exception is limited to instances in which the conduct under investigation is criminal in nature. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. Civ. App.–El Paso 1992, writ denied) (law enforcement exception inapplicable to cases in which there is not criminal investigation or prosecution).

You state that the submitted information concerns an on-going investigation that is being conducted by the Code Enforcement Division of the city's fire department. This office has previously found an arson unit of a fire department to be a "law enforcement agency"for purposes of section 552.108. *See* Open Records Decision Nos. 371 at 1 (1983) (predecessor statute), 127 at 8 (1976) (same). In this instance, however, you have not established that the Code Enforcement Division is a law enforcement agency, that the ordinance at issue is

criminal in nature, or that violations of this ordinance carry criminal sanctions. Accordingly, we find that the submitted report does not concern an alleged crime and is therefore not excepted from disclosure by section 552.108 of the Government Code. *See Morales*, 840 S.W.2d at 526.

You also assert that information identifying the source of the submitted report is protected by the common law informer's privilege. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim, App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which a governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1998), 208 at 1-2 (1978). This privilege protects the identities of individuals who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision No. 582 at 2 (1990), 514 at 4-5 (1988). The privilege excepts an informer's identity only to the extent necessary to protect the informer's identity. Open Records Decision No. 549 at 5 (1990).

You explain that the complaint "involves an alleged nuisance condition that exists in violation of Section 8.20 of the City of Georgetown Code of Ordinances" and that "[v]iolations of the Code of Ordinances are punishable by fine." Based on your representations and our review of the submitted information, it appears that this condition was reported to the city's Code Enforcement Division, which is responsible for investigating alleged violations of the city code. Under these circumstances, we conclude that under section 552.101, you may withhold information identifying the informer, which we have marked, pursuant to the common law informer's privilege.

In summary, the city may withhold information that identifies the informer but must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

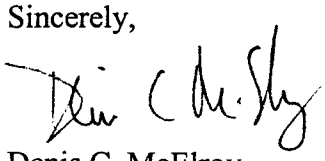
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 165132

Enc. Submitted documents

c: Mr. Verne K. Johnson
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Georgetown, Texas 78726
(w/o enclosures)